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SUPREME COURT, U.S.

NO. 82-5317

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MICHAEL GENE BERRYHILL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

I.

Whether the trial court, and the Georgia Supreme Court on direct appeal, properly rejected Petitioner's Motion for a Change of Venue?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Michael Gene Berryhill, a/k/a Michael Gene Stanley, was indicted in the Superior Court of Bartow County, Georgia, for the felony murder of George C. Hooks, Jr., on October 7, 1974. After a trial by jury in January 1975, Petitioner was convicted of both charges and sentenced to death for the murder and life imprisonment for the robbery.

On direct appeal, Petitioner's convictions and sentences were affirmed. Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975), cert den., 429 U.S. 1054 (1977). Petitioner then sought State habeas corpus relief which proceedings resulted in the

setting aside of his armed robbery conviction while the felony murder conviction and death sentence were upheld. Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), cert den, 441 U.S. 967 (1979). Subsequently, Petitioner was granted federal habeas corpus relief as to the murder conviction on the basis of a Miranda violation.

Petitioner was retried in June 1981, in the Superior Court of Bartow County, Georgia; the jury returned a guilty verdict on the felony murder charge and imposed a death sentence.

PART TWO

SUMMARY OF ARGUMENT

I.

Based upon this Court's established guidelines, concerning prejudicial, pre-trial publicity which might serve to deprive a criminal defendant of a fair and impartial jury, Petitioner has failed to show that a denial of his Motion for Change of Venue was unconstitutional. In addition, Petitioner sets forth no reasons requiring admission of the results of the public opinion poll conducted for purposes of this case.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S MOTION FOR CHANGE OF VENUE WAS PROPERLY DENIED IN ACCORDANCE WITH THE GUIDELINES ESTABLISHED BY THIS COURT.

A. PETITIONER FAILED TO SHOW THAT THE TRIAL SETTING WAS INHERENTLY PREJUDICIAL OR THAT THE JURY SELECTION PROCESS INDICATED ACTUAL PREJUDICE.

Petitioner maintains that this case warrants the development of a new standard by this Court applicable to change of venue motions in the retrial of capital cases. Respondent submits that no such standard is constitutionally mandated, particularly, in the instant case where only minimal evidence of community prejudice is presented.

The trial court denied Petitioner's Motion for Change of Venue on the basis that an insignificant percentage of jurors was excused because they could not lay aside their previously-formed opinions regarding the case. (Trial Transcript, p. 817-818). The Georgia Supreme Court held that the low percentage (8%) of venirepersons excused for prejudice corroborated the impartiality of the other venirepersons.

In regard to pretrial publicity, only two occurrences were established prior to Petitioner's 1981 retrial, however, Petitioner focuses on the publicity attendant to his 1975 trial, conviction and sentence. 1/

1/ Respondent would note that Petitioner's contention that his Motion for Change of Venue in the first trial should have been granted was rejected on direct appeal. Berryhill v. State, 235 Ga. 549, 550, 221 S.E.2d 185 (1975), cert den. 429 U.S. 1054 (1977).

As Petitioner acknowledges, he is required to show either "[1] that the setting of the trial was inherently prejudicial or [2] that the jury selection process which he complains permits an inference of actual prejudice." Murphy v. Florida, 421 U.S. 794, 803 (1975). In Murphy v. Florida, supra, 20 of the 78 prospective jurors were excused for prejudice (26%) and this Court held that that percentage "by no means suggests a community with sentiment so poisoned against Petitioner as to impeach the indifference of jurors who displayed no animus of their own." 421 U.S. at 803. Accordingly, the 8% of venirepersons excused for prejudice in the present case does not indicate any circumstances which could have denied Petitioner a fair trial.

Petitioner contends that stricter standards, regarding pretrial publicity and prejudice, should be set by this Court for the retrial of capital cases. Respondent would note Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980), cert den., 450 U.S. 936 (1980), reh. den., 451 U.S. 933 (1981), a Georgia death case which this Court declined to review under similar circumstances:

> We note finally that the evidence shows only one recent newspaper article concerning the Appellant. Eighteen pages of exhibits concern articles published in the first trial - that is, two years prior to resentencing, and three pages of exhibits concern the United States Supreme Court's reversal of sentence. There is no evidence of a "total inundation of the judicial process by the media." Estes v. Texas, 381 U.S. 532 (85 S.Ct. 1628, 14 L.Ed.2d 543) (1965);

Sheppard v. Maxwell, 384 U.S. 333 (86 S.Ct. 1507, 16 L.Ed.2d 600) (1966).

Also see, U.S. ex. rel. Parson v. Anderson, 354 F.Supp. 1060, 1083-1084 (D. Del., 1972), aff'd, 481 F.2d 921 (1973).

Respondent maintains that the rule proposed by Petitioner, "that when prospective jurors state that they have opinions as to a defendant's guilt, have knowledge of the prior sentencing verdict in the case, or have knowledge of a community presumption of the appropriate sentence, community prejudice should be presumed." (Petitioner's brief p. 10), presents an impossible standard equivalent to that rejected by this Court in Irvin v. Dowd, 366 U.S. 717, 723 (1961):

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.

Therefore, Petitioner has failed to establish any necessity for the development of new standards by this Court, especially, in light of the insubstantial evidence presented here.

B. THE TRIAL JUDGE PROPERLY REFUSED TO ADMIT THE RESULTS OF THE PUBLIC OPINION POLL CONDUCTED AT THE REQUEST OF PETITIONER'S ATTORNEY.

The Georgia Supreme Court upheld the trial court's refusal

to admit the results of a public opinion poll conducted by the University of Georgia School of Journalism at the request, and under the supervision, of one of Petitioner's attorneys. The Georgia Supreme Court aptly noted that Petitioner neither authenticated the poll nor presented any authority requiring admission of such evidence. In addition, the poll was not directed to the pivotal question, whether persons having an opinion could lay that opinion aside if serving on Petitioner's jury.

The only effort to authenticate the poll was through the testimony of a law professor, who acting as one of Petitioner's attorneys, helped organize the poll but admittedly was not an expert statistician. The two journalism professors who could have testified as to the reliability and validity of the poll refused to appear because they did not want to reveal the names of the individuals polled to the trial judge for an in-camera inspection. Consequently, the trial judge ruled:

> . . . The Court is not going to consider this information since none of the interviewers have appeared to testify about their methodology and what they did and who they called and what the answers were, and neither has the expert in polling come in or statistician to discuss the size of the sample, the standard deviation and all of the statistical material that goes into validating - showing that a survey is valid and reliable. (Hearing Transcript, May 25, 1981, p. 46).

It would appear that the existing case law, regarding the use of public opinion polls to evaluate a Motion for Change of Venue, disfavors the use of such evidence, at least in comparison to the data derived from an extensive voir dire examination. United States v. Haldeman, 559 F.2d 31, 64, Ftn. 43 (D.C. 1976), the Court of Appeals for the District of Columbia held:

> In reaching the conclusion that a change of venue was required, the dissent relies heavily on two disparate, although equally suspect, indicia. The first is a poll commissioned by the Appellant and conducted by a public opinion research company. This Court has previously held, however, that a trial judge, sitting in lieu of a jury, is not required to accept expert testimony. Hightower v. United States, 117 U.S. App. D. C. 43, 325 F.2d 616 (1963), cert den., 384 U.S. 994, 86 S.Ct. 1903, 16 L.Ed. 1009 (1966). Similarly, the trial court must also be afforded discretion in accessing the weight to be given expert testimony that is submitted - as was this evidence - in support of a pretrial motion. Indeed, such discretion is peculiarly necessary where the expert evidence consists of the result of a public opinion poll - data that is open to a variety of errors. Cf. Ziesel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322, 339-344 (1960). It is our judgment that in determining whether a fair and imparital jury could be empanelled the trial court did not err in relying less heavily on a poll taken in private by private

> pollsters and paid for by one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel pursuant to procedures, practices and principles developed by the common law since the reign of Henry II.

A similar view was expressed by the district court in United States v. Mandel, 431 F.Supp. 90, 100-101 (D. Ma. 1977), aff'd, 602 F.2d 653 (4th Cir. 1979):

> Defendants have submitted the results of a public opinion poll in an attempt to demonstrate that actual prejudice exists among prospective jurors to such an extent that an impartial jury cannot be selected. The conclusions drawn in the poll appear to invade the province of the court and are based upon hearsay information. In the opinion of the court, a public opinion poll is no substitute for voir dire examination. Cf. U.S. v. Partain, 320 F.Supp. 275 (E.D. La. 1970). (footnote deleted).

Based on the foregoing, Petitioner's arguments regarding admission of the public opinion poll do not warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari filed on behalf of the Petitioner, Michael Gene Berryhill.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JANICE G. HILDENBRAND, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rule of the Supreme Court of the United States, I have this day served a true and correct of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of the same in the United States Mail with proper address and adequate postage to:

John Charles Boger
10 Columbus Circle
New York, New York 10019

This 23th day of September, 1982.

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CERTIFICATE OF FILING UNDER RULE 28

I, JANICE G. HILDENBRAND, A Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on September 28, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

Janice G. Hildenbrand
JANICE G. HILDENBRAND

Sworn to and subscribed
before me this ____ day
of September, 1982.

Jan Lawson
NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia, State at Large
My Commission Expires June 11, 1984